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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 85A05-0605-CR-274
	)	
ROBERT SHERMAN, JR.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0307-FD-59

September 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The State of Indiana appeals the post-conviction court's judgment that Robert Sherman, Jr.'s appellate counsel was ineffective for failing to argue on direct appeal that the police officers lacked articulable individualized suspicion to seize his trash and for failing to seek transfer to the Indiana Supreme Court on that basis. Because the law at the time of Sherman's trial and when his appeal became final did not require articulable individualized suspicion to seize a defendant's trash, we find that the post-conviction court's judgment is clearly erroneous and therefore reverse.

Facts and Procedural History

The underlying facts of this case, taken from this Court's memorandum decision affirming Sherman's convictions on direct appeal, are as follows:

> The facts most favorable to the judgment are that on June 25, 2003, two Indiana State Police officers went to Sherman's residence in LaFontaine. The police had become suspicious of Sherman because during the course of a marijuana eradication investigation, they learned that Sherman was an associate of another individual who had purchased items from a marijuana magazine. On June 25, 2003, there was a trash bag on the far northeast corner of Sherman's property, right next to a driveway and a public sidewalk. It was a weekly trash collection day and it appeared that the trash bag had been placed outside for collection. While standing on the public sidewalk, one of the troopers picked up and removed the trash bag from Sherman's property. In the trash bag, the police found mail addressed to Sherman, "marijuana plant material," and hand-rolled cigarette papers. Tr. p. 75. The officers field-tested the plant material from the rolled-up cigarette papers, and the substance tested positive for marijuana.
>
> On July 2, 2003, the same officers removed another trash bag at the same location. The trash bag was located in the same place as it had been on June 25, and an officer again removed it from Sherman's property while standing on the public sidewalk. This trash bag contained mail addressed to Sherman, Zigzag rolling papers, and several pieces of plant material.
>
> The police officers sought and obtained a search warrant on July 2, 2003, executing the warrant on the same day. In Sherman's house, the

> police found green plant material, scissors, rolling paper, and hand and electronic scales. The police arrested Sherman at that time. The State Police laboratory later confirmed that the green plant material was marijuana. Indeed, one of the bags found at Sherman's residence contained 41.99 grams of marijuana. The State charged Sherman with possession of marijuana and maintaining a common nuisance.
>
> Sherman filed a motion to suppress the evidence the police found at his residence, claiming that the police had no authority to remove the trash bags from his property and that he always burns all of his paper trash, so the trash bags could not have contained all that the officers claimed they did. The trial court held a hearing on Sherman's motion on October 20, 2003. At the hearing, Sherman's girlfriend testified that he always burns all paper trash in a barrel in his backyard, so there could not have been any mail addressed to him or any marijuana material in the trash bags found by the police that had been placed out for collection. The trial court denied Sherman's motion to suppress on October 29, 2003, finding that "the investigating officers did not have to traverse the property of the defendant to retrieve the garbage bag." Appellant's App. p. 3. A jury trial was held on February 25 and 26, 2004, and the jury found Sherman guilty as charged.

Sherman v. State, No. 85A05-0404-CR-246 (Ind. Ct. App. Oct. 28, 2004). The trial court sentenced Sherman to concurrent terms of two years for each of the convictions with all but 120 days suspended. Sherman appealed to this Court, where he argued that the police officers ran afoul of the United States and Indiana Constitutions by removing the trash bags from his property. We found that the seizure of Sherman's trash was proper under both constitutions and therefore affirmed his convictions. Slip op. at 6, 8.

On September 1, 2005, Sherman filed a petition for post-conviction relief challenging the trash search and appellate counsel's failure to argue that the officers lacked reasonable suspicion to search his trash. Following a hearing, the post-conviction court issued an order on November 8, 2005, granting Sherman post-conviction relief. Specifically, the post-conviction court stated:

> 1. The search of the Defendant's trash, which ultimately led to an application for a search warrant, was not reasonable under the totality of the circumstances. The record in this proceeding is void of any evidence that the officers who picked up Defendant's trash possessed any reasonable suspicion that Defendant was involved in illegal activity at the time of the pick up.
> 2. Defendant's failure to pursue his appeal beyond the appellate court level is excusable given the conduct of his then attorney in failing to pursue further appeal, which Defendant reasonably believed he had paid for and would occur.
> 3. The Court is convinced that had the appeal been pursued, it would not have survived the test established by the Indiana Supreme Court in *Litchfield v. State*, 824 N.E.2d [356] (Ind. 2005).
> 4. Defendant's Petition should [be] granted and his conviction should be and is now vacated.

Appellant's App. p. 88. On November 17, 2005, the State filed a motion to correct error, in which it argued as follows:

> The new "reasonable suspicion" test for trash pick-up cases was not announced until the Indiana Supreme Court handed down *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005), which was more than a year after the jury trial herein. It is the State's position that the Court improperly analyzed the facts of this case pursuant to the stricter *Litchfield* standards that were not in place at the time of the trash pick-up or the trial of this matter.

Appellant's App. p. 90. Following a hearing, the trial court granted the State's motion to correct error on January 9, 2006, and vacated its earlier order. Thereafter, on February 8, 2006, Sherman filed a motion to correct error. In this motion, Sherman conceded that *Litchfield*, "on its own, does not provide sufficient grounds for the Court to grant [him] post-conviction relief." *Id.* at 94. Instead, Sherman argued that the "primary basis for [his] entitlement to post-conviction relief is based upon the efforts, or lack thereof, provided [him] by Robert Dawalt, who represented [him] both at Trial and on Appeal." *Id.* Sherman specifically alleged that he paid attorney Dawalt to seek transfer to the

Indiana Supreme Court, which he did not do, that attorney Dawalt did not inform him of this Court's opinion on direct appeal, and that attorney Dawalt did not return his calls. Following another hearing, the trial court granted Sherman's motion to correct error on February 16, 2006, and reinstated the November 8, 2005, order granting Sherman post-conviction relief. The State now appeals.

Discussion and Decision

Post-conviction procedures do not provide an opportunity for a "super-appeal"; rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004), *trans. denied*. Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence. *Id.*

This appeal by the State is from a judgment granting post-conviction relief. When the State appeals a judgment granting post-conviction relief, our review is governed by Indiana Trial Rule 52(A), which provides that "the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See State v. Moore*, 678 N.E.2d 1258 (Ind. 1997), *reh'g denied*. The "clearly erroneous" standard is a review for sufficiency of the evidence. *State v. Eubanks*, 729 N.E.2d 201, 204 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*. We reverse only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id*. "'[C]lear error' review requires the appellate court to assess whether there is

any way the trial court could have reached its decision." *Moore*, 678 N.E.2d at 1261 (quotation omitted). Under this standard, we defer substantially to findings of fact but not to conclusions of law. *Id*

The State contends that the post-conviction court's judgment that attorney Dawalt was ineffective is clearly erroneous. Specifically, the post-conviction court found that it was "convinced that had the appeal been pursued, it would not have survived the test established by the Indiana Supreme Court in *Litchfield v. State*, 824 N.E.2d [356] (Ind. 2005)." Appellant's App. p. 100. We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Fisher v. State*, 810 N.E.2d 674, 676 (Ind. 2004). The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id.* at 677. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* Here, the third category is implicated.[1] Inadequate presentation of certain issues when such were not deemed waived on direct appeal admittedly are the most difficult for defendants to advance and reviewing tribunals to support. *Hopkins v. State*, 841 N.E.2d 608, 612 (Ind. Ct. App. 2006). When the issues

[1] Even though Sherman alleges that attorney Dawalt was ineffective for failing to seek transfer to the Indiana Supreme Court, the first category of appellate counsel ineffectiveness is not implicated. Denial of access to an appeal occurs "when counsel's nonfeasance or malfeasance acts to deprive the appellant *entirely* of his right to review." *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997) (emphasis added), *reh'g denied*. That is, "[w]here an appellant's right to be heard on appeal is *completely* denied him by his counsel's performance, concerns of judicial economy and repose are little implicated." *Id.* (emphasis added). Here, Sherman had a direct appeal; therefore, he was not completely denied the right to be heard. As our Supreme Court has noted, "A healthy majority of lawyers who lose before the Indiana Court of Appeals . . . elect not to seek transfer." *Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. 1997).

presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference is afforded both to the attorney's professional ability and the ability of the appellate judges who first decided the case to recognize a meritorious argument. *Id.* An ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. *Id.* Judicial scrutiny of counsel's performance, already highly deferential, is at its highest for this type of claim. *Id.* "Relief is only appropriate when the appellate court is confident it would have ruled differently." *Id.* (quotation omitted).

The post-conviction court's judgment is clearly erroneous and must be reversed. The seizure of Sherman's trash in 2003 complied with the prevailing case law for such seizures. The Indiana Supreme Court first addressed the legality of trash searches under Article I, Section 11 of the Indiana Constitution in *Moran v. State*, 644 N.E.2d 536 (Ind. 1994), *reh'g denied*. In that case, our Supreme Court stated, "Because we read this section of our constitution as having in its first clause a primary and overarching mandate for protections from unreasonable searches and seizures, the reasonableness of the official behavior must always be the focus of our state constitutional analysis." *Id.* at 539. The Court held that this reasonableness is to be determined based on a totality of the circumstances. *Id.* at 541. The Court concluded that the search in that case was reasonable, explaining that "one who places trash bags for collection intends for them to be taken up, and is pleased when that occurs" and that the officers conducted themselves in a similar manner to trash collectors and did not cause a disturbance. *Id.*

This Court decided Sherman's direct appeal in October 2004, when *Moran* was still the law in Indiana, and in March 2005, our Supreme Court decided *Litchfield*, which was several months after Sherman's direct appeal became final. In *Litchfield*, our Supreme Court imposed, for the first time, the requirement of articulable individualized suspicion, essentially the same as is required for a "Terry stop" of an automobile, for trash seizures. 824 N.E.2d at 364; *see also Edwards v. State*, 832 N.E.2d 1072, 1076 (Ind. Ct. App. 2005) (noting that *Litchfield* changed the test for evaluating trash seizures). The *Litchfield* court believed that this new test "impose[d] the appropriate balance between the privacy interests of citizens and the needs of law enforcement." 824 N.E.2d at 364.

It is undisputed that *Litchfield* was not decided at the time of Sherman's trial or when his appeal became final. It is well settled that appellate counsel cannot be held ineffective for failing to anticipate or to effect a change in the existing law. *Trueblood v. State*, 715 N.E.2d 1242, 1258 (Ind. 1999), *reh'g denied*. As a result, attorney Dawalt cannot be deemed ineffective for failing to argue on direct appeal that the police officers did not have articulable individualized suspicion to seize his trash because that was not the law at the time. Moreover, attorney Dawalt cannot be deemed ineffective for failing to seek transfer to the Indiana Supreme Court. Given the state of the law at the time, there was simply no indication that transfer on this issue might have been fruitful. In short, attorney Dawalt's lack of prescience cannot be held against him.

As for Sherman's allegations on appeal that attorney Dawalt did not communicate with him, there is simply no showing of prejudice. And as for Sherman's claim that

attorney Dawalt did not seek transfer as promised, attorney Dawalt followed the law at the time and therefore cannot be deemed deficient for failing to seek transfer on an issue that appeared to be decided at the time. We therefore reverse the post-conviction court.

Reversed.

BAKER, J., and CRONE, J., concur.